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11 JULY 2002

Criminal Procedure — Revision — Revisionary powers of High Court — Whether case fit for revision — Whether sentence and period of disqualification in accordance with law — Whether judge should exercise powers of revision

Following his plea of guilty, the appellant was convicted on two charges of driving a motor lorry while under the influence of intoxication liquor under s 44(1) of the Road Transport Act 1987 ('the Act') and was sentenced to three years imprisonment for each charge. He was also disqualified from holding or obtaining a driving licence for two years. Dissatisfied with the sentence, the appellant appealed. On realizing that the sentence and the period of disqualification were not in accordance with the law, the deputy public prosecutor asked the court to exercise its powers of revision and to correct the mistake. The issues for the determination of the court were: (i) whether the case was a fit case for revision; (ii) whether the minimum sentence of three years imprisonment and a minimum fine of RM8,000 in respect of an offence under s 44(1) of the Act are mandatory; and (iii) whether the minimum period of five years of disqualification is mandatory under s 44(3) of the Act.

Held, exercising the powers of revision and correcting the mistakes:

(1) Section 44(1) of the Act prescribed very clearly that upon conviction, the offender shall be punished with imprisonment for a term of not less than three years and not more than ten years and to a fine of not less than RM8,000 and not more than RM20,000. Thus, the learned magistrate must impose at least the minimum sentence of imprisonment of three years and a minimum fine of RM8,000 for the offence as the punishment prescribed therein is mandatory in its terms by reason of the word 'shall' and 'and' in the section. Failure to impose the minimum fine as was done in the case made the sentence of imprisonment only without the fine illegal (see p 197C-E).

(2) Section 44(3) of the Act is very clear in its provision which states that a person convicted under this section shall be disqualified from holding or obtaining a driving licence for a period of not less than five years from the date of the conviction. In the present case, the appellant was only disqualified for a period of two years which is contrary to the provision under the section. The provision under s 44(3) of the Act, like the provision relating to punishment under s 44(1) of the Act, is also mandatory in its terms. Therefore, failure to impose a minimum period of five years of

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disqualification rendered the magistrate's order of disqualification erroneous in law (see p 197E-G).

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[Bahasa Malaysia summary]

Setelah membuat pli bersalah, perayu telah disabitkan atas dua pertuduhan memandu sebuah lori di bawah pengaruh minuman keras di bawah s 44(1) Akta Pengangkutan Jalan 1987 ('Akta tersebut') dan telah dijatuhkan hukuman tiga tahun penjara untuk setiap pertuduhan. Beliau juga digantung daripada memegang atau mendapat lesen memandu selama dua tahun. Tidak puas hati terhadap hukuman tersebut, perayu telah membuat rayuan. Setelah mendapati bahawa hukuman dan tempoh penggantungan lesen tersebut tidak menurut undang-undang, timbalan pendakwa raya telah memohon mahkamah untuk menggunakan kuasa kajian semulanya dan membetulkan kesilapan tersebut. Persoalan-persoalan yang perlu ditentukan oleh mahkamah adalah: (i) sama ada kes tersebut sesuai untuk kajian semula; (ii) sama ada hukuman minima tiga tahun penjara dan denda minima RM8,000 berhubung satu kesalahan di bawah s 44(1) Akta tersebut adalah mandatori; dan (iii) sama ada tempoh minima lima tahun penjara untuk penggantungan lesen tersebut adalah mandatori di bawah s 44(3) Akta tersebut.

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Diputuskan, menggunakan kuasa kajian semula dan membetulkan kesilapan-kesilapan tersebut:

- (1) Seksyen 44(1) Akta tersebut jelas memperuntukkan bahawa setelah disabitkan, pesalah hendaklah dijatuhkan hukuman penjara bagi tempoh tidak kurang daripada tiga tahun dan tidak lebih sepuluh tahun dan denda tidak kurang daripada RM8,000 dan tidak lebih daripada RM20,000. Oleh itu, majlisret yang bijaksana hendaklah mengenakan sekurang-kurangnya hukuman penjara untuk tempoh minima tiga tahun dan denda minima RM8,000 bagi kesalahan tersebut kerana hukuman yang diperuntukkan adalah mandatori oleh sebab perkataan 'shall' dan 'and' dalam seksyen tersebut. Kegagalan untuk mengenakan denda minima sebagaimana yang dilakukan dalam kes ini menjadikan hukuman penjara tanpa denda tersebut menyalahi undang-undang (lihat ms 197C-E).
- (2) Seksyen 44(3) Akta tersebut adalah jelas dalam peruntukannya yang menyatakan bahawa seseorang yang telah disabitkan di bawah seksyen ini hendaklah digantung daripada memegang atau mendapatkan lesen memandu bagi tempoh tidak kurang daripada lima tahun daripada tarikh penyabitkan. Dalam kes sekarang ini, perayu hanya digantung lesen bagi tempoh dua tahun yang bertentangan dengan peruntukan dalam seksyen tersebut Peruntukan di bawah s 44(3) Akta tersebut, seperti

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A peruntukan di bawah s 44(1) Akta tersebut, adalah juga mandatori. Oleh itu, kegagalan untuk mengenakan tempoh minima lima tahun penggantungan lesen menyebabkan perintah penggantungan lesen majisret tersebut salah di sisi undang-undang (lihat ms 197E–G).]

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Notes

For cases on revisionary powers of High Court, see *5 Mallal's Digest* (4th Ed, 2001 Reissue) paras 2757–2768.

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Legislation referred to

Criminal Procedure Code s 325

Road Transport Act 1987 s 44(1), (2), (3)

Johari bin Ibrahim representing himself as the appellant.

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Yaacob bin Hj Chik (Deputy Public Prosecutor, AG's Chambers) for the prosecution.

Nik Hashim J: The appellant pleaded guilty to the following charges of driving a motor lorry while under the influence of intoxicating liquor under s 44(1) of the Road Transport Act 1987 ('the Act'):

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(1) Bahawa kamu pada 10 Mei 2001 jam 8.30 malam di KM 153 Jalan Kuantan–Kuala Terengganu (Hadapan Centre Point Chukai) di dalam Daerah Kemaman dalam Negeri Terengganu, kamu sebagai pemandu M/lori No TQ 4075 didapati kamu memandu M/lori jenis Nissan tersebut di atas jalan raya di bawah Pengaruh Minuman Yang Memabukkan Menyebabkan Tidak Dapat Mengawal Kenderaan sehingga menyebabkan berlakunya kemalangan jalan raya iaitu melanggar belakang M/lori No KAM 8499 jenis Hino yang diletakkan di tepi jalan. Oleh itu, kamu telah melakukan kesalahan di bawah s 44(1) APJ 333/87 dan dihukum di bawah seksyen yang sama.

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(2) Bahawa kamu pada 10 Mei 2001 jam 8.40 malam di Hadapan Ibu pejabat Polis Daerah Kemaman (Jalan Chukai–Air Putih) di dalam Daerah Kemaman dalam Negeri Terengganu, kamu sebagai pemandu M/Lori No: TQ 4075 jenis Nissan didapati kamu memandu M/Lori tersebut di atas jalan raya di bawah Pengaruh Minuman Yang Memabukkan Menyebabkan Tidak dapat Mengawal Kenderaan sehingga menyebabkan berlakunya kemalangan jalan raya iaitu dinding (Pagar) sebelah kanan komponen M/lori No: TQ 4075 terseret dan mencederakan seorang pejalan kaki yang berada di atas pembahagi jalan, Nama: Nur Hasan bin Ahmad, No KP: 620601715253. Oleh itu, kamu telah melakukan kesalahan di bawah s 44(1) APJ 333/87 dan dihukum di bawah seksyen yang sama.

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and was convicted and sentenced to three years imprisonment for each charge and the imprisonment was ordered to run concurrently. The appellant was also disqualified from holding or obtaining a driving licence for two years and his driving licence was ordered to be endorsed.

Dissatisfied with the sentence, the appellant, who was unrepresented,

appealed against the sentence and asked the court to reduce the sentence as he had a family to support. After considering, I found there was no merit in the appeal and hence, I dismissed it.

At the outset of the hearing before me on 12 June 2002, the learned deputy public prosecutor ('DPP') informed the court that the first charge disclosed no offence while the sentence in respect of the second charge and the order of disqualification imposed by the learned magistrate were not in accordance with the law, and accordingly, the learned DPP asked the court to exercise its powers of revision to correct the mistakes, which he discovered only on that morning.

On being satisfied that this case was a case fit for revision, I, acting under s 325 of the Criminal Procedure Code and after giving the appellant the opportunity to be heard, revised the case and made the following orders:

- (i) the conviction in respect of the first charge was quashed. The sentence of three years imprisonment was set aside and the charge was struck out;
- (ii) a fine of RM8,000 and in default of payment of the fine six months imprisonment was imposed in addition to the sentence of three years imprisonment in respect of the second charge;
- (iii) the period of disqualification from holding or obtaining a driving licence was increased from the two years to five years; and
- (iv) the particulars of the conviction were endorsed on the appellant's driving licence.

I now give my reasons with regard to the revision.

Section 44 of the Act states:

- (1) Any person, who when driving a motor vehicle on a road or other public place —
 - (a) is under the influence of intoxicating liquor or drug, to such an extent as to be incapable of having proper control of the vehicle; or
 - (b) has so much alcohol in his body that the proportion of it in his breath, blood or urine exceeds the prescribed limit,

and causes the death of or injury to any person shall be guilty of an offence and shall, on conviction, be punished with imprisonment for a term of not less than three years and not more than ten years and to a fine of not less than eight thousand ringgit and not more than twenty thousand ringgit.

- (2) The court shall order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.
- (3) A person convicted under this section shall be disqualified from holding or obtaining a driving licence for a period of *not less than five years* from the date of the conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of the conviction. (Emphasis added.)

It is thus clear from the above mentioned provisions that a person commits an offence under s 44(1) of the Act only when he, while driving a motor

A vehicle under the influence of intoxicating liquor, causes the death of or injury to any person. Therefore, it is not an offence under the section if no person is injured or killed as the result of such driving.

Thus, the first charge as framed against the appellant disclosed no offence. A collision with another lorry thereby causing damage to the lorry without causing the death of or physical injury to any person is not an offence under s 44(1) of the Act. In the result, the appellant's plea of guilty is not a plea at all as he could not plead guilty to the commission of an act which is not an offence in law. The appellant's plea of guilty is not real and his conviction is therefore a nullity. Hence, I quashed the conviction and set aside the sentence and struck out the first charge.

C Regarding the second charge, I found that the sentence and the period of disqualification imposed by the learned magistrate were not in accordance with the law under which the appellant was convicted.

D Section 44(1) of the Act prescribes very clearly that upon conviction, the offender shall be punished with imprisonment for a term of not less than three years and not more than ten years and to a fine of not less than RM8,000 and not more than RM20,000. My view is that the learned magistrate must impose at least the minimum sentence of imprisonment of three years and a minimum fine of RM8,000 for this offence as the punishment prescribed therein is mandatory in its terms by reason of the word 'shall' and 'and' in the section, and failure to impose the minimum fine as was done in this case makes the sentence of imprisonment only without the fine illegal.

E With regard to the period of disqualification, s 44(3) of the Act is very clear in its provision which states that a person convicted under this section shall be disqualified from holding or obtaining a driving licence for a period of not less than five years from the date of the conviction. In the present case, the appellant was only disqualified for a period of two years. Obviously, this is contrary to the provision under the section. The provision under s 44(3) of the Act, like the provision relating to punishment under s 44(1) of the Act, is also mandatory in its terms. Therefore, failure to impose a minimum period of five years of disqualification renders the magistrate's order of disqualification erroneous in law.

F By virtue of s 44(2) of the Act, the particulars of the conviction must be endorsed on the appellant's driving licence.

H In the circumstances, I exercised my powers of revision and corrected the mistakes and made the orders accordingly.

Powers of revision exercised and mistakes corrected.

I Reported by Ezatul Zuria Azhari